Supreme Court, U.S.
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No.

In The
Supreme Court of the United States

APA TRANSPORTATION CORPORATION,
Petitioner,

v.

TEAMSTERS LOCAL UNION NO. 560, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

KEITH R. MCMURDY
Counsel of Record
THEODORE M. EISENBERG
On the Brief
FOX ROTHSCHILD LLP
100 Park Avenue, Suite 1500
New York, New York 10017
(212) 878-7900

Counsel for Petitioner

December 23, 2008

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

1. Whether the Third Circuit's erroneous construction of the "faltering company" exception under the Workers Adjustment Retraining Notification Act, 29 U.S.C. §2102(b)(1), renders the exception illusory, thereby precluding employers from obtaining essential financing, and requiring premature business closings that damage the economy and precipitate job loss?

2. Whether the Third Circuit's granting of summary judgment without considering evidence of "actively seeking ... business" expunges statutory language and fundamentally misconstrues the breadth of the statutory exception?

3. Whether the Third Circuit's summary judgment determination usurps the fact finder's function, and forecloses Petitioner's right to present material facts in its defense?

RULE 14.1(b) STATEMENT

A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Defendant-Appellee and Petitioner: APA Transport Corp.

Plaintiffs-Appellants and Respondents: Teamsters Local Union No. 560, Teamsters Local Union No. 470, Brian Campbell, John Cronin, Jr., Andrew Imperatore and Richard Yurchisin.

RULE 29.6 CORPORATE DISCLOSURE

Pursuant to Rule 29.6 of the Rules of the United States Supreme Court, there is no parent or publicly held company owning 10% or more the stock of the Petitioner.

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PETITION FOR A WRIT OF CERTIORARI

APA Transport Corp. ("APA") petitions for a writ of certiorari to review the opinion and judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The Opinion of the U.S. Court of Appeals for the Third Circuit, dated August 29, 2008, is officially reported at 541 F.3d 233, and is reproduced at 1a-37a.

The Memorandum Opinion and Order of the U.S. District Court for the District of New Jersey, dated December 7, 2006, is unofficially reported at 2006 WL 3534029 and 2006 U.S. Dist. LEXIS 88437 and is reproduced at 47a-90a.

JURISDICTION

The Judgment of the U.S. Court of Appeals for the Third Circuit was entered on August 29, 2008. A Petition for Rehearing was timely submitted on September 19, 2008, and denied on October 6, 2008. This petition is timely under 28 U.S.C. §3101(c) and Supreme Court Rule 13.3 because it is being filed within 90 days of the date of the denial of the Petition for Rehearing. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

Federal jurisdiction was invoked in the original action to the District Court under 29 U.S.C. §§2101-2109, 28 U.S.C. §1331, 28 U.S.C. §11332 and 29 U.S.C. §1001 *et seq.*

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are 29 U.S.C. §2102(b)(1) of the Workers Adjustment Retraining Notification Act ("WARN"), 29 U.S.C. §§2102-2109, and are reproduced at 93a-95a.

STATEMENT OF THE CASE

This case arises from the shut-down of APA, and the permanent lay-off of its workforce. Plaintiffs are unions representing their employee members, and individuals representing a class of non-union employees, all of whom are alleged to be aggrieved employees under WARN.

Plaintiffs allege a violation of the 60-day WARN notice period. 3a. APA asserts the affirmative defense of a *faltering company*, which entitled APA to provide reduced notice of closure, based on its demonstrated search for additional financing and additional business. 4a.

APA was a regional trucking business that had operated since 1947. In 1996, APA entered into a Loan and Security Agreement with Transamerica Business Capital Corporation ("Transamerica"). The loan provided a revolving credit arrangement with a $40 million limit, secured by the real property, equipment and accounts receivable of APA. The agreement had an expiration date of February 28, 2002. APA had previously defaulted on loan covenants in 1999 and 2000, and had executed agreements, whereby the defaults were waived and/or the loan agreement was amended, so as to maintain a financing arrangement.

On October 24, 2001, pursuant to APA's request, Transamerica met with APA to discuss the additional financing of its operations. 6a. On November 8, 2001, during the pendency of the financing request, Transamerica notified APA of a default in the loan agreement. The parties were able to work out the issues, and on December 10, 2001, Transamerica and APA agreed to a Fifth Waiver and Amendment of the Loan Agreement to cure the default.

Discussions continued, and on January 2, 2002, after curing the default, APA offered mortgages on two properties as collateral for an additional five to six million dollars of capital above the $40,000,000 limit. On February 13, 2002, Transamerica notified APA by letter that it would not provide additional financing, and that the loan agreement would therefore terminate on February 28, 2002.

The day after Transamerica denied additional financing, APA sent a WARN notice, expressly relying on the *faltering company* exception, to Teamster Local Unions 560 and 470 and to its non-union employees. APA ceased operations on February 20, 2002.

On December 7, 2006, the District Court granted summary judgment in favor of APA, on four issues, specifically that: (1) APA had met each criterion of the *faltering company* exception, including *actively seeking capital* at the time a WARN notice would have been required (December 20, 2001), (2) union benefit funds are not *aggrieved employees* within the meaning of WARN, (3) APA was the only *employer* of the affected employees, and (4) APA's notices were sufficiently specific to meet WARN requirements.

Plaintiffs appealed to the Third Circuit. On August 28, 2008, the Third Circuit affirmed the District Court entry of summary judgment on all counts, except the *faltering company* exception. The Third Circuit held that, as a matter of law: (1) APA failed to demonstrate that it actively sought capital on December 20, 2001, and (2) APA's meeting to discuss financing with its chief lender, Transamerica, on October 24, 2001 was insufficient to meet the *actively seeking* standard.

The Third Circuit not only reversed the District Court's grant of summary judgment, but instructed the District Court to enter summary judgment in favor of the Plaintiffs.

APA petitions this Court for review of the Third Circuit's decision that APA did not satisfy the *faltering company* exception to the 60-day WARN notification requirement.

REASONS TO GRANT THE PETITION

This is a case of first impression, interpreting the *faltering company* exception under WARN, and in particular the construction of the *actively seeking capital* requirement within that exception. 29 U.S.C. §2102(b)(1). This case is of national significance in that the Third Circuit has so narrowly construed this exception as to render it a nullity. Accordingly, employers, which would otherwise be able to raise additional capital or obtain additional financing, will be compelled to provide a premature WARN notice, which will preclude refinancing and result in premature closings. This result is destructive of the rights of labor and management, and is contrary to the manifest intent of WARN to provide an opportunity for

refinancing, and thereby augment the economic security of workers.

Although there is no current conflict in the circuits (given that this is a case of first impression), the antagonistic statutory constructions of the Third Circuit and the District Court presage an inevitable circuit conflict. Given the significant impact of the *faltering company* exception in this faltering economy, it is imperative that this Court establish a uniform standard to define employer obligations.[1] Employer refinancing occurs under stressful conditions, in an abbreviated time frame, within a framework of extraordinary confidentiality constraints. This Court's guidance is essential for the statutory exception to be rationally applied.

The Third Circuit sets forth two reasons for its decision. The first rationale is that WARN, on its face, requires a discrete written request for financing exactly 60 days prior to the date the employer actually closes. 35a-36a.

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[1] Following the Third Circuit's decision in this case, there have been numerous lawsuits filed, alleging violations of WARN notice requirement. *See* Curry et al. v. MRS Management Co., Inc. et al., No. 08-cv-02194 (N.D. Tex. filed Dec. 10, 2008); Pearson v. Land South Adventures, LLC, No. 08-cv-02395 (M.D. Fla. filed Dec. 2, 2008); Bergman v. Thelen LLP, No. 08-cv-5322 (N.D. Cal. filed Nov. 24, 2008); Guippone v. BH S & B Holdings, LLC, No. 08-01747 (Bankr. S.D.N.Y. filed Nov. 20, 2008); Berenshteyn v. Lehman Brothers Holdings, Inc., 08-01654 (Bankr. S.D.N.Y. filed Nov. 4, 2008); McCoy v. Value City Holdings, Inc., No. 08-01648 (Bankr. S.D.N.Y. filed Oct. 29, 2008); Austen v. Archway Cookies, LLC, No. 08-12323 (Bankr. D. Del. filed Oct. 6, 2008); Kratzel v. Bill Heard Enterprises, Inc., No. 08-80154 (Bankr. N.D. Ala. filed Oct. 3, 2008).

The Third Circuit errs in requiring proof of formal employer action to obtain financing exactly sixty days prior to the date of shutdown – a manifest impossibility unless the employer was prescient, had pre-determined the date of shutdown, or there were a fortuitous correlation of dates.

As discussed by the District Court, the *faltering company* exception cannot be rationally construed to require a party to predict the future. Nevertheless, the Third Circuit concludes that the plain language of the statute requires that employers have such prophetic abilities, and that this incongruity must be taken up with the Congress, not the Court. 34a.

By viewing the refinancing process as a series of discrete and disconnected acts, rather than a continuum of conduct towards the goal of obtaining refinancing, the Third Circuit disregards the reality of the refinancing process, and defeats the purpose of the exception. The Third Circuit's parsing of the statute is premised on a peculiar view of *actively seeking*. If, for example, APA had made a written request for financing on December 9 – according to the Third Circuit -- that request would have no continuing validity on December 10, because the specific act did not occur that day. Contrary to the Third Circuit's construction, logic and experience mandate that what is *actively sought* on day 1, continues to be *actively sought* on day 2, unless nullified by an intervening event.

The Third Circuit's decision is premised on a virtual impossibility: namely, that APA had to take a formal action on December 20. The Third Circuit ignores the earlier December 10th Waiver and

Amendment to the Loan Agreement, finds the January 2 tender of properties to be thirteen days late, and thereby fails to address the continuum of specific steps which precede and follow the operative December 20 date.

The Court's second rationale is that even if formal action were not required exactly sixty days before shutdown (December 20), the October 24 meeting between APA and Transamerica was insufficient, as a matter of law, to meet the standard of *actively seeking capital*. The Third Circuit's error is threefold: (1) the October 24 meeting was sufficient, (2) the October 24 meeting must be viewed contextually, in connection with the amended loan agreement, executed between Transamerica and APA on December 10, and the tender of properties by APA on January 2, and (3) if these actions were deemed insufficient on the skeletal record of the summary judgment proceeding, a hearing should have been ordered.

The employer's conduct must be reviewed in the context of its financial relationships, to determine if it was *actively seeking capital* at the time the WARN notice would have otherwise been required. APA executives had ongoing discussions with APA's lender, Transamerica, over a period of months (which spanned the WARN notification date), to secure additional financing, to cure a prior default, and to offer additional property to secure the requisite financing. Moreover, APA had a long course of dealing with Transamerica, as Transamerica had provided financing to APA for many years, had a security interest in APA's property, equipment and receivables, and was the most viable source of additional financing,

given the history and Transamerica's security interests.

The Third Circuit views the specifics of the APA/Transamerica relationship, and their course of dealing, as immaterial. The Court thereby deprives APA of a hearing, to develop a full factual record of the parties' financial transactions, including the continuum of APA's actions during the critical period following the September 11 World Trade Center bombing through January 2, 2002. These facts are material to obtaining a full understanding of the extent of APA's efforts to obtain additional financing from Transamerica, as well as through other sources.

The District Court found that APA's showing, as a matter of law, fell within the *faltering company* exception. The Third Circuit not only vacated that decision, but found APA's factual showing insufficient as a matter of law, without consideration of the "actively seeking...business" component of the statutory exception, and without providing APA with the opportunity to develop the factual record.

This Court should grant *certiorari* to construe the *faltering company* exception, consistent with WARN's intent, so that employers will not be precluded from reliance on this exemption at a time of unprecedented economic turmoil.

I. The Third Circuit's Determination that APA was not Actively Seeking Capital on the Operative Date Renders the Faltering Company Exception a Nullity.

The WARN Act requires that an employer not effect a plant closing or shutdown until 60 days after notice is given to affected employees. There is, however, an exception to that restriction. An employer may order the shutdown or closing before the conclusion of the 60-day period if:

> *[A]s of the time that notice would have been required the employer was actively seeking capital or business* which, if obtained, would have enabled the employer to avoid or postpone the shutdown and the employer reasonably and in good faith believed that giving the notice required would have precluded the employer from obtaining the needed capital or business.

29 U.S.C. §2102(b)(1). (Emphasis added.) The exception is to be narrowly construed, and is an affirmative defense. The only aspect of the exception that is at issue, is the *actively seeking capital* requirement, and specifically, the temporal requirement that the capital must be sought *as of the time that notice would have been required.*[2] The Department of Labor WARN regulations provide at 20 C.F.R. § 639.9(a)(1) that:

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[2] As set forth below, the Third Circuit's excising of the "actively seeking...business" component to the *faltering company* exception is also at issue, in light of the Court's failure to order a trial to develop a factual accord.

> An employer must have been actively seeking capital or business at the time that 60-day notice would have been required. That is, the employer must have been seeking financing or refinancing through the arrangement of loans, the issuance of stocks, bonds, or other methods of internally generated financing; or the employer must have been seeking additional money, credit, or business through any other commercially reasonable method. The employer must be able to identify *specific actions* taken to obtain capital or business.

(Emphasis added.) The Third Circuit erroneously conflates the *specific actions* referenced at the end of the regulation with the statutory *actively seeking capital* requirement (as of the date that notice would have been due). 34a. The statute, however, does not use the term *specific actions,* and the regulation does not require that the *specific actions* occur on the date notice was otherwise due. *Specific actions* are necessary to demonstrate *active seeking,* but need not themselves occur on the critical date. Rather, *specific actions* which occurred before and/or after the critical date (December 20), may, as here, demonstrate that *active seeking* occurred on that date.

The District Court found no precedent for the "precise requirement" that *specific actions* must occur exactly 60 days before the eventual shutdown. The District Court cautioned that even if such precedent existed, it should be approached with "great trepidation." 78a. The District Court reasoned that:

> Simply put, to require such precision from an employer would effectively eliminate any

> practical application of the "faltering business" exception as it would require said employer to read the minds of the financial institutions or institutions from which it seeks financing.

78a. The District Court cited APA's situation as a textbook example of why such a construction was untenable. 78a-79a.

As referenced by the District Court, APA's "financial straits ... significantly worsened after the tragic events of September 11, 2001, and APA "met with Transamerica on October 24, 2001 to request additional funds." Moreover, based on the unrebutted testimony of Transamerica representative, Christopher Norrito, the Court found that, at the time of the October 24th meeting, Transamerica had:

> [R]eceived a communication from ... APA Transport in which they indicated that they're seeking additional monies from Transamerica.

79a. Moreover, according to Mr. Norrito, at that time, Transamerica wanted to keep APA "afloat," not "pull the plug" and was considering "pour[ing] more money into APA." 80a.

The District Court also found that "there was no basis to anticipate a closure date of February 20, 2002," and "thereby not reasonable to insist that Defendant APA Transport take specific, actual and literal steps on December 20, 2001 when they had taken said steps on October 24, 2001." 82a.

Moreover, APA worked through the balance of 2001 to cure prior defaults on the existing loan agreement

with Transamerica, which was a prerequisite to obtaining additional financing. On December 10, 2001, APA and Transamerica executed a Waiver and Fifth Amendment to the Loan Agreement, thereby avoiding default, and reaffirming that the underlying loan would remain in place. Negotiating this new agreement was a condition precedent to APA obtaining additional financing, and it occurred ten days before the operative date of December 20. This loan agreement was followed by the tender of mortgages on two additional properties on January 2, 2002 to secure additional financing.

The District Court noted that APA took additional specific steps after October 24, and did not view as determinative the fact that these actions, which surrounded December 20, did not occur exactly on December 20. The District Court concluded that for APA to provide notice of termination to employees prior to receiving a decision on the loan "would not only have been premature, but also, would have diminished APA Transport's chances of obtaining a loan at that time." 82a.

By contrast, the Third Circuit: (1) found the meeting between APA and Transamerica to discuss additional financing on October 24 (58 days before the peremptory date of December 20), insufficient as a matter of law, (2) ignored the loan agreement executed by APA and Transamerica on December 10 (10 days before the peremptory date), and (3) found that the January 2 tender of two properties (13 days after the peremptory date) occurred too late.

The Third Circuit determined that the October 24, 2001, meeting did not constitute a "formal request for

financing." 28a. In so doing, the Court nullified the testimony of Mr. Norrito, concerning active consideration given to additional financing on October 24. The Court ignored Mr. Norrito's testimony that at the time of the October 24 meeting to discuss financing, Transamerica had received a communication from APA seeking additional financing. 35a. Based on this unrebutted testimony, APA is entitled to summary judgment.[3]

The Court creates a "formality requirement" that is not to be found in the statute or regulation. The Court places undue weight on the manner in which the question of additional financing arose, as opposed to whether the financing was sought. The Court thereby establishes a dubious distinction in which critical refinancing, that the employer desires, and which would save the employer, is found to have been *actively considered*, but not *actively sought*.

The Court also ignores the course of dealing between the parties. The Court erroneously relies on the absence of an APA application for refinancing, when such application was not required by Transamerica of APA in light of their relationship. 36a. The Court's imposition of its own normative

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[3] The Third Circuit takes exception to the District Court's reliance on Mr. Norrito's testimony as conclusive in the context of summary judgment, even though the testimony was not disputed with regard to the key point at issue. 35a, 79a-82a. Moreover, having found Mr. Norrito's testimony not dispositive, the Third Circuit fails to consider the import of the testimony, despite its manifest significance in terms of APA's reliance on the October 24 interchange, in support of its contention that it was *actively seeking capital* as of that date.

practices in connection with the parties' negotiations is not appropriate. The error is magnified by the Court's decision that summary judgment should be granted for Plaintiffs, without the benefit of additional fact-finding concerning APA's multi-year history of obtaining, renewing and changing financing arrangements with Transamerica.

Moreover, rather than considering the relationship between the events of October 24, December 10 and January 2 to inform its view of whether *active seeking* occurred on December 20, the Court ignores the common thread, and views each event in isolation. Thus, for the Court, the significance of the January 2 tender of property is only that it did not occur thirteen days earlier. Nor does the Court acknowledge the manifest connection between the loan agreement of December 10, which cured the prior default, and APA's request for additional financing. Rather, the Court concludes that "there was no affirmative attempt by APA Transport after that [October 24, 2001] meeting to actually secure that financing." 25a. This conclusion is manifest error.

The Third Circuit relies on the Conference Report issued when Congress passed the WARN Act, and specifically that: "an employer must prove the *specific steps* it had taken, at or *shortly before* the time notice would have been required." 134 CONG. REC. S8686-01. 29a. (Emphasis added.) This construction is directly contrary to the Third Circuit's conclusion that

the *specific action* must occur on the operative date. 34a.[4]

Contrary to the Third Circuit's conclusion, APA did take *specific steps:* the request for financing that Norrito attested to, the October 24 meeting to discuss the financing, the December 10 Loan Agreement to cure the default (ten days before the operative date). Indeed, the term *step* is telling, in that it makes clear that the act does not encompass the entire undertaking. Rather, a step is one movement forward in a progression of movements along a common path. It is, according to Webster's Third New International Dictionary 22 (1993), "a stage in a process," ... "an action, proceeding, or measure often occurring as part of a series."

The Third Circuit mischaracterizes APA's conduct as "waiting for Transamerica to offer additional financing." 28a-29a. That is due to the Court's viewing of each *step* in the refinancing process without regard to the *staircase* by which the *steps* are defined. In so doing, the Court mandates that "actively" seeking financing requires some specific action beyond that contemplated by the statute, or by the parties engaged in the transaction.

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[4] The Third Circuit's reliance on the "unforeseeable business circumstances" exception – as demonstrating that Congress was not concerned with foreseeability in connection with the *faltering company* exception – is inapposite, as the conditions envisioned by the two exceptions are unrelated. Moreover, in each case, notice is required once the closing is foreseeable. In the former case, notice is required as soon as practicable after the unforeseen event occurs, in the latter case, after the financing is rejected.

It is well settled that "[t]he role of the courts in interpreting a statute is to give effect to Congress's intent." Rosenberg v. XM Ventures, 274 F.3d 137, 141 (3d Cir. 2001). *See also* M.A. ex rel E.S. v. State –Operated Sch. Dist. Of Newark, 344 F.3d 335, 348 (3d Cir. 2003) (holding in matters of statutory interpretation, it would be inappropriate to "squint myopically" at a phrase in isolation rather than in context of the "text and structure" as a whole). Statutes must be interpreted "to receive a sensible construction, limiting application so as not to lead to injustice and oppression." Evcco Leasing Corp. v. Ace Trucking, 828 F.2d 188, 195 (3d Cir. 1987). The overall guiding principle should be that "statutes should be interpreted to avoid untenable distinctions and unreasonable results wherever possible." American Tobacco Co. v. Patterson, 456 U.S. 63, 71, 102 S. Ct. 1534, 1538 (1982). A basic tenet of statutory construction is that courts should interpret a law to avoid absurd or bizarre results. In re: Kaiser Aluminum Corporation, 456 F.3d 328, 338 (3d Cir. 2006), *citing* Demarest v. Manspeaker, 498 U.S. 184, 191, 111 S. Ct. 599 (1991).

The Third Circuit's formalistic reading is based on untenable distinctions, which lead to an irrational result that nullifies Congressional intent. Congress enacted an exception to serve as an exception, and not to be a nullity.

II. The Third Circuit Failed to Consider Evidence of Actively Seeking Business, as Opposed to Capital, thereby Improperly Rendering that Portion of the Statutory Exception a Nullity.

The District Court granted summary judgment in favor of APA based solely on its specific actions to obtain additional financing through Transamerica. Therefore, it had no need to decide whether APA had been actively seeking business. The Third Circuit, in vacating the District Court's decision, and awarding summary judgment in favor of Plaintiffs, did not look beyond the scope of the District Court's determination. Accordingly, it failed to consider evidence in connection with the seeking of additional business, and limited its decision to refinancing through Transamerica.

In so doing, the Third Circuit ignored the express language of WARN, which references actively seeking "business" as an alternative to actively seeking capital. 29 U.S.C. §2101(b)(1). This distinction is also set forth in the enabling regulations, which provide that the *faltering company* exception applies to employers "seeking additional money, credit or business through any commercially reasonable method." 20 C.F.R. § 639.0(a)(1).

There is record evidence of APA's attempts to develop additional business, separate and apart from requesting refinancing through Transamerica. 79a. However, the complete record of these additional efforts was never developed because it was extraneous to the District Court's decision. The issuance of a summary judgment by the Third Circuit, without development of the factual record in this regard, is

manifest error, and has the effect of contracting the *faltering company* exception to exclude the "additional ... business" language. The exception is not, however, limited to financing, but to a broader range of business initiatives that could avoid or postpone the closing.

This is a matter of first impression, as no Circuit Court has considered the scope of the seeking *business* component of the *faltering company* exception. The Third Circuit erred in excising this component of the exception from the statute, and restricting the judicial inquiry to refinancing.

III. The Third Circuit Improperly Granted Summary Judgment in Favor of the Plaintiffs Despite Material Facts that Were in Dispute.

It is well settled that the standard of review of a District Court's decision granting summary judgment is plenary. NBT Bank Nat'l Ass'n v. First Nat'l Cmty. Bank, 393 F.3d 404, 409 (3d Cir. 2004). It is also well established that the reviewing Court must apply the same standard for granting summary judgment employed by the District Court and view the facts in the light most favorable to the non-moving party. Moore v. City of Philadelphia, 461 F.3d 331, 340 (3d Cir. 2006). Summary Judgment is only appropriate where "drawing all reasonable inferences in favor of the nonmoving party, there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Lexington Ins. Co. v. W. Pa. Hosp., 423 F.3d 318, 322 n. 2 (3d Cir. 2005). Therefore, in order to grant summary judgment for the Plaintiffs in this matter, the Third Circuit must view all of the evidence in a light most favorable to APA,

and must then conclude that there are no genuine issues as to any material fact.

Summary judgment may be appropriate if the pleadings and discovery show there is no genuine issue of material fact as to any material fact and that the moving party is entitled to judgment as a matter of law. Rule 56(c), Fed. R. Civ. P. A fact is material if it might affect the outcome of the suit under the governing law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). An issue of fact is genuine if the evidence is such that a reasonable jury could return a verdict for nonmoving party. *Id.* All ambiguities and inferences should be drawn in favor of the party opposing the motion for summary judgment. Matsushita Electronic Industries Co. v. Zenith Radio Corp, 475 U.S. 574, 587-88 (1986); Harris v. Provident Life & Accident, 310 F.3d 73, 78 (2d Cir. 2002).

The moving party bears the burden of identifying matters that it believes demonstrate the absence of a genuine issue of material fact. Celotex v. Catrett, 477 U.S. 317, 323 (1986). Summary judgment is proper only if, when viewing the evidence in a light most favorable to the non-moving party, there is no genuine issue of material fact. Covington v. City of New York, 171 F.3d 117, 121 (2d Cir. 1999). Thus, for the Third Circuit to reverse the District Court and grant summary judgment in favor of the Plaintiffs, there cannot be a material issue of fact in dispute.

As set forth above, the District Court correctly granted summary judgment in APA's favor based on the *faltering company* exception, and the Third Circuit applied the wrong legal standard in vacating that decision. Moreover, even applying, *arguendo*, the Third

Circuit's standard, there are disputed material facts, and APA is entitled to a hearing.

First, there is a factual dispute over what documentation was required to extend the underlying loan agreement. Specifically, there is a dispute over whether a written request for extension was required. The Third Circuit notes that a formal written request was required by the loan document. 36a. The record, however, contains testimony from Transamerica that it was considering an extension without the formal request. 78a-82a.

Second, there is a factual dispute over whether a formal written request was required to obtain additional financing. The Third Circuit found that no formal request was made, but Transamerica representatives testified that the only written "credit memo" that was required was an internal document and that at the end of 2002, "all of [its] options were open." 81a. Consideration was being given to additional financing without a written request.

Third, the record is not developed in connection with the prior course of dealing between APA and Transamerica, which is material to understanding the significance of the parties' actions with respect to the financing negotiations subsequent to September 11, 2001. The parties had ongoing financing arrangements, which had, over the course of years, been modified to take into account operating conditions and other events. 82a. These events shed light on Transamerica's requirements and expectations in connection with APA's refinancing request that is central to this litigation.

Fourth, the record is not developed concerning the conduct of the parties (in connection to refinancing), which occurred post September 11, 2001, and particularly between October 24 and December 20. For example, the record references APA putting together financial statements to cure its default in connection with the December 10 loan agreement, but there are no specifics as to whether and what documents were exchanged between the parties in connection with the agreement. 7a.

Fifth, the record contains evidence of APA's attempts to obtain capital through the potential sale of terminals to another trucking company that would have generated additional income, and references to the efforts of APA to obtain additional new business in light of the failure of certain competitors. 7a-8a. The District Court did not address these factual issues in its decision because it found that the search for commercial financing through Transamerica was adequate proof of *actively seeking capital.*

As set forth above, had the District Court determined that APA's actions with Transamerica did not constitute an active search for financing, it would have had to consider the search for capital from other sources. It also would have had to consider the efforts of APA to increase business and develop new revenue streams. Because the District Court's analysis did not require it to consider these additional efforts, the Third Circuit was duty bound to order a trial.

In sum, assuming *arguendo*, that this Court does not vacate the Third Circuit's decision and reinstate the decision of the District Court, a full evidentiary hearing is required. Such a hearing would permit the

exploration of the factual issues set forth above, via consideration of additional testimony and other evidence not previously reviewed, with corresponding analysis of credibility and sufficiency. Credibility determinations, the weighing of the evidence and the drawing of legitimate inferences from the facts are jury functions. Reeves v. Sanderson Plumbing Products, 530 U.S. 133, 150, 120 S. Ct. 2097 (2000).

Finally, viewing the evidence in a light most favorable to APA, it cannot be said that no reasonable juror could find that APA met its burden of establishing it was *actively seeking capital or business*. The District Court, evaluating the same facts, concluded that no reasonable juror could find that APA had not met this test.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

KEITH R. MCMURDY
Counsel of Record

THEODORE M. EISENBERG
On the Brief

FOX ROTHSCHILD LLP
100 Park Avenue, Suite 1500
New York, New York 10017
(212) 878-7900

Counsel for Petitioner

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